Nos. 87-2012, 87-2051, and 88-4

In The

Supreme Court of the United States

October Term, 1989

NO. 87-2012

FW/PBS, INC., et al.,

Petitioners,

v.

CITY OF DALLAS, TEXAS, et al.,

Respondents.

NO. 87-2051

M.J.R., INC., et al.,

Petitioners,

v.

CITY OF DALLAS, TEXAS, et al.,

Respondents.

NO. 88-49

CALVIN BERRY, III, et al.,

Petitioners,

v.

CITY OF DALLAS, TEXAS, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS CITY OF DALLAS, et al.

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QUESTIONS PRESENTED

1. Does the temporary denial or revocation of a license to operate a sexually oriented business based on convictions for specified crimes that are demonstrated to proliferate in neighborhoods surrounding such businesses, impose a prior restraint on protected expression or improperly single out businesses engaged in First Amendment protected activities?

2. Are the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51 (1965), applicable to the license denial and revocation provisions of the Dallas sexually oriented business ordinance?

3. Do the provisions of the Dallas sexually oriented business ordinance relating to adult motels violate the First, Fourth, Fifth and Fourteenth Amendments or any constitutionally protected freedom of association?

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BRIEF OF RESPONDENTS CITY OF DALLAS, et al.

STATEMENT OF THE CASE

In the early summer of 1986, after a thorough investigation of the facts and law involved (DX 3), the City of Dallas began to consider specific means of regulating the deleterious effects of sexually oriented businesses upon the community.

The first formal consideration of a proposed ordinance occurred at a public hearing before the Dallas Plan Commission on June 12, 1986. After considering the experiences of at least eight other cities and counties (DX 3 and DX 5), the testimony of numerous citizens (DX 1 and DX 2 p. 2), and evidence concerning possible locations available under the ordinance (DX 15), the fifteen member Plan Commission voted unanimously in favor of adopting the ordinance. The transcript of the Plan Commission hearing shows that the Plan Commission was convinced that sexually oriented businesses cause harmful secondary effects to surrounding neighborhoods (DX 1 pp. 23, 49, 51-52, 57-58) and that the members of the Plan Commission were attempting to control these secondary effects and not the content of sexually oriented materials (DX 1 pp. 23, 48-52, 57).

The Dallas City Council considered the Plan Commission's unanimous recommendation as well as the eight municipal studies and the map indicating available locations. The City Council also considered a Dallas study which found a 90 percent higher crime rate near sexually oriented businesses than in other business areas (DX 19 and 20). On June 18, 1986, the Dallas City Council voted unanimously in favor of adopting Ordinance No.

19196, which added a new Chapter 41A (the Dallas ordinance) to the Dallas City Code.

In adopting the ordinance, the Council made legislative findings that sexually oriented businesses are frequently used for unlawful sexual activities, have a deleterious effect on surrounding businesses and neighborhoods, and cause increased crime and decreased property values.[1]

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[1] The Dallas City Council made the following findings:

(1) Sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature;

(2) that the city police have made a substantial number of arrests for sexually related crimes in sexually oriented business establishments;

(3) that concern over sexually transmitted diseases is a legitimate health concern of the city which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens;

(4) that licensing is a legitimate and reasonable means of accountability to ensure that operators of sexually oriented businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation;

(5) that there is convincing documented evidence that sexually oriented businesses, because of their very

(Continued on following page)

The ordinance requires sexually oriented businesses to locate at least 1000 feet from a church, school, residential district, park adjacent to a residential district, a residential lot, or another sexually oriented business.

(Continued from previous page)

nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values;

(6) that sexually oriented businesses have serious objectionable operational characteristics particularly when they are located in close proximity to each other, thereby contributing to urban blight and downgrading the quality of life in adjacent areas;

(7) that it is in the interest of public safety and welfare to prohibit persons convicted of certain crimes from engaging in the occupation of operating sexually oriented businesses;

(8) that the crimes listed in Section 41A-5(a)(10) are serious crimes which are directly related to the duties and responsibilities of the occupation of operating sexually oriented businesses;

(9) that the occupation of operating sexually oriented businesses brings a person into constant contact with persons interested in sexually oriented materials and activities thereby giving the person repeated opportunities to commit offenses against public order and decency should he be so inclined; and

(10) that a person who has been convicted of a crime listed in Section 41A-5(a)(10) is presently unfit to operate any sexually oriented businesses until the respective time periods designated in that section expire. (DX 16, pp. 1-5).

§ 41A-13(a) & (b). A three-year amortization period was provided for nonconforming uses. § 41A-13(f). Licensing requirements were imposed to assist in the enforcement of the ordinance.

Petitioners filed three separate complaints in the United States District Court for the Northern District of Texas, Dallas Division, challenging all aspects of the ordinance and seeking declaratory and injunctive relief. The three complaints were consolidated and the case was presented to the District Court on cross motions for summary judgment. The District Court found the ordinance constitutional except for four minor exceptions. Those provisions have since been deleted (See FW/PBS App. to Pet. for Writ of Cert., App. 103-111) and are not in issue here.

Petitioners appealed to the United States Court of Appeals, Fifth Circuit. The Court of Appeals upheld the constitutionality of the Dallas ordinance and rejected petitioners' challenge. Judge Thornberry concurred in part and dissented in part.

This Court on May 4, 1988, stayed the decision of the Court of Appeals except for its holding that the provisions of the ordinance regulating the location of sexually oriented businesses do not violate the Federal Constitution. On February 27, 1989, this Court granted petitioners' writs of certiorari limited to questions I, II and III in case No. 87-2012; questions 1 and 2 in case No. 87-2051; and both questions in case No. 88-49. All issues relating to the Dallas ordinance's locational restrictions were excluded from review.

SUMMARY OF ARGUMENT

I. The questions accepted for review in this case involve the right of a city to temporarily deny or revoke a license to operate a sexually oriented business because a person seeking or holding a license has been recently convicted of at least one of thirteen sexually related crimes. The Dallas ordinance, which has as its primary enforcement tool a restriction on the location of sexually oriented businesses, was adopted after examination of studies conducted in other cities which documented that sexually oriented businesses have a deleterious effect on both existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values. In response to these studies and to a report demonstrating higher levels of crime, especially sexually related crime, associated with these businesses in Dallas, the City Council adopted the ordinance to address the crime problem as well as the other deleterious effects of sexually oriented businesses.

Petitioners argue that the license denial and revocation provisions of the ordinance impose a prior restraint on constitutionally protected speech and do not provide required procedural safeguards. The enforcement of this ordinance, however, does not carry with it any of the attributes of prior restraint that are condemned in *Near v. Minnesota*, 283 U.S. 697 (1931), *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977), or *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), the cases relied upon by petitioners for their assertion. No license is required for any speech, publication, or movie. The Dallas ordinance is not concerned with the content of materials or

services sold at a sexually oriented business; rather the purpose of the ordinance is to protect neighborhoods and reduce the crime associated with these businesses.

Since the ordinance regulates many types of sexually oriented businesses, including those which have no expressive activity associated with them, the assertion that businesses engaged in expressive activities are singled out for regulation and closure has no basis. Neither do the sexually related crimes used for disqualification single out expressive activity. Only three of the thirteen crimes are related to illegal expressive activity, i.e., obscenity; the sale, distribution, or display of material harmful to a minor; and possession of child pornography. See § 41A-5(a)(10), J.A. 18-19. It would be illogical for the city to exclude these sexually related crimes from the disqualifications simply because they involve unprotected speech. The use of obscenity as a predicate offense for government enforcement against sexually related businesses has been upheld in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. ___, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989). Conviction for obscenity as a temporary disqualification in the Dallas ordinance has less dire consequences upon the availability of expressive material than obscenity as a predicate offense in *Fort Wayne Books*. Under Indiana law, a RICO prosecution can result in forfeiture of materials, imprisonment, and a ban on conducting business.

Because those who operate sexually oriented businesses generally convey other peoples' messages, if one operator is forced to close because of criminal convictions, the amount of material available to the public will not be diminished. The demand for sexually oriented material and the likely competition for locations under

the location restrictions of the ordinance, will result in a new purveyor taking his place and, more than likely, buying his stock-in-trade.

Petitioners argue that the license denial and revocation provisions of the ordinance are defective because they do not provide the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51 (1965). These safeguards are required in cases involving a prior restraint on sale or publication. As previously argued, the Dallas ordinance does not have any of the attributes of prior restraint. Since the ordinance does not seek to suppress the content of any expressive material and nothing in the licensing scheme regulates the content of any expressive material, the Court of Appeals correctly held that "the Ordinance need only meet the standards applicable to time, place, and manner restrictions and need not comply with *Freedman's* more stringent limits on regulations aimed at content." *FW/PBS, Inc. v. Dallas*, 837 F.2d 1298, 1303 (5th Cir. 1988) (See also, FW/PBS App. to Pet. for Writ of Cert., App. 1-30).

II. The Dallas ordinance is valid under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), as a content-neutral time, place, and manner regulation designed to serve a substantial government interest in protecting neighborhoods from the negative secondary effects of sexually oriented businesses while not unreasonably limiting alternative avenues of communication. If the license denial and revocation provisions are separated from the rest of the ordinance for analysis, the fact that they may not fit neatly into the time, place, and manner category should not deter the Court from analyzing them under the same standard since they meet the same criteria.

Application of the test established in *United States v. O'Brien*, 391 U.S. 367 (1968), to the license denial and revocation portion of the ordinance brings its validity into sharper focus. The substantial governmental interest in protecting neighborhoods surrounding sexually oriented businesses is unrelated to the suppression of free expression. The disqualification provisions are narrowly tailored to apply only to businesses which have been documented as causing adverse secondary effects, and only to the crimes which are most prevalent in and around these types of businesses. For these reasons, the license denial and revocation provisions of the ordinance are valid.

III. The adult motel petitioners are not regulated under the ordinance on the basis of any expressive activity but because they rent rooms for short periods of time. For this reason, the ordinance is valid as applied to them since it is rationally related to the city's legitimate interest in curbing prostitution and other sex-related crimes in the city's neighborhoods. Nevertheless, the studies relied upon by the city justify the regulation of any adult motels which do advertise the availability of sexually oriented movies or videos and are thus brought under the ordinance because of expressive activity. The rationale for including them in the regulations is the same as for adult motion picture theaters and adult arcades. The arguments of the motel petitioners do not substantiate any of their asserted constitutional claims, and the Court must uphold the adult motel provisions of the ordinance as valid.

ARGUMENT

I. THE LICENSE DENIAL AND REVOCATION PROVISIONS OF THE DALLAS SEXUALLY ORIENTED BUSINESS ORDINANCE DO NOT IMPOSE A PRIOR RESTRAINT ON THE DISSEMINATION OF CONSTITUTIONALLY PROTECTED EXPRESSION.

By refusing to accept for review any of the issues raised by petitioners concerning the location restrictions of the Dallas sexually oriented business ordinance, this Court has left standing the holdings from the lower courts regarding the validity of the underlying purpose and effect of the ordinance. The adult cabaret petitioners argue extensively that the licensing scheme as a whole in the Dallas ordinance is invalid. See Brief of Petitioners M.J.R., Inc., et al. at 9-21. This Court, however, accepted for review the narrow questions of whether the denial or revocation of a license on the basis of prior criminal convictions imposes a prior restraint or inevitably singles out persons engaged in First Amendment protected activity for regulation and closure.

A. The temporary denial or revocation of a license to operate a sexually oriented business based on convictions for crimes that are demonstrated to proliferate in neighborhoods surrounding such businesses is in furtherance of the city's substantial governmental interests and does not impose a prior restraint.

1. Enforcement of the license denial and revocation provisions in the Dallas sexually oriented business ordinance does not resemble the enforcement activity in other cases where the Court has found a prior restraint.

Petitioners rely on *Near v. Minnesota*, 283 U.S. 697 (1931), and *Vance v. Universal Amusements*, 445 U.S. 308

(1980), for the proposition that the license denial and revocation provisions of the Dallas sexually oriented business ordinance impose a prior restraint upon expressive material. Their reliance is misplaced in both instances. Unlike the Dallas case, those two cases considered the use of state nuisance statutes to enjoin the future publication or dissemination of expressive material.

In *Near*, a publication was enjoined and thus made unavailable because of what its publisher had said on previous occasions. Under the Dallas ordinance, no publication is made unavailable because of the enforcement of the ordinance, nor need the number of sexually oriented businesses in the city be reduced. Rather, the ordinance attempts to curb identifiable persons who may reasonably be expected, because of their conduct in recent years, to promote, permit, or participate in the criminal conduct that sexually oriented businesses have been shown to foster.

The offender in *Near* had addressed serious political issues, albeit in a virulently anti-Semitic way. In the Dallas case, there is no claim that any political or religious discourse would be in any way restrained by the Dallas ordinance. The attempt in *Near* was to prevent the publisher from repeating his conduct in publishing scandalous material. The Dallas ordinance does not prevent anyone from repeating the crimes for which he has been convicted. Rather, the ordinance attempts to remove from certain licensed businesses persons whose recent criminal history strongly suggests that they will be inclined or easily tempted to engage in the criminal conduct to which sexually oriented businesses are particularly susceptible.

The prohibition placed on the offending person in *Near* was perpetual; the disability under the Dallas ordinance can be cured in a few years if the person avoids certain criminal conduct. In *Near*, the publication was the target of the enforcement without regard to the criminal record of the publisher. In the Dallas ordinance, the target is the methods of operating sexually oriented businesses that encourage crime.

Unlike the situation in *Near*, the materials and activities of sexually oriented businesses will continue to be widely available in Dallas even if the ordinance is vigorously enforced. Indeed, even a person who is disqualified under the ordinance could continue to distribute such materials wholesale or by mail order. If the defendant in *Near* could not publish his newspaper, however, his political viewpoint would not have been available to any significant degree in the community. The suppression of a publication or viewpoint is neither the intended nor the likely consequence of the Dallas ordinance. The ordinance does nothing to make sexually explicit materials any less generally available than they would otherwise be.

Vance involved state statutes authorizing injunctions to issue against the future exhibition of unnamed films that depict particular acts enumerated in the state's obscenity statute. These statutes resulted in the direct regulation of the content of motion pictures. This Court found that the statutes in *Vance* authorized prior restraints and were procedurally deficient. Like *Near*, *Vance* involved censorship of the future dissemination of expressive material, before the material was made available to the public.

The Dallas ordinance has no attributes of censorship. It does not call for the review of or prevent the publication or dissemination of any expressive material. It merely attempts to prevent, for a limited time, those persons convicted of certain crimes from engaging in a business that has a demonstrated relationship with those crimes. The ordinance is concerned only with the qualifications of those who may engage in a crime-sensitive business. It does not attempt to regulate the content of what is sold. Its purpose is not to suppress expressive material, but to reduce crime.[2] In neither *Near* nor *Vance* was there a criminal conviction prior to enforcement. In fact, the purpose of the statute in each of those cases was to avoid the state's onerous burdens under the criminal law. Under the Dallas ordinance, a person does not lose a sexually oriented business license until he is actually convicted of certain crimes.

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[2] The Dallas City Council clearly stated its purpose and intent in passing the ordinance:

> It is the purpose of this chapter to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. (J.A. 8-9).

Judge Thornberry's statement in his concurring and dissenting opinion below, that the "denial of a license to engage in speech is . . . the classic prior restraint . . ." [*FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298, 1307 (5th Cir. 1988)] is not appropriate to this case. The Dallas ordinance does not license people to engage in speech. It merely licenses people to operate sexually oriented businesses at particular locations. No license is required by this ordinance for any speech or publication, regardless of the sexually explicit content. An unlicensed person may write, create, publish, sell wholesale, sell through the mail, or give away sexually explicit material. In fact, an unlicensed person may operate a bookstore, so long as it does not have as one of its principal business purposes the sale of sexually explicit materials. Indeed, no license is required for most bookstores or video stores in the city.[3] The underlying basis of Judge Thornberry's dissent seems to be his view that a license denial has the effect of totally banning speech. This view is mistaken. Since the grant of a license does not authorize one to engage in

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[3] The assertion by the American Booksellers Association, et al., *amici curiae* brief in support of petitioners (Booksellers Br. 15-16) that virtually all bookstores or video stores will be subject to the ordinance is a mistaken interpretation of the requirements of the ordinance. Even petitioners do not make this claim. The ordinance definition of adult bookstore or adult video store is limited to commercial establishments which have as one of their *principal* business purposes the sale or rental of sexually explicit materials. See § 41A-2(2), J.A. 10. There are currently only 37 (Source: City of Dallas records) adult bookstores or adult video stores required to be licensed out of approximately 196 retail bookstores and 201 retail video stores in the city. Source: Greater Dallas Southwestern Bell Yellow Pages December 1988-89, pp. 344-48, 1860-61.

speech, its denial does not prevent one from engaging in speech. The concept of prior restraint is not relevant here. No speech is banned and no materials are censored.

Finally, the stringency of the rule against prior restraints rests in large part on the matter of who bears the burden of proof. There is a great difference between a publisher's having to persuade a censor that his yet-to-be-published manuscript is worthy of publication and a prosecutor's having to persuade a jury that an already published manuscript is so unworthy of publication as to be criminal.[4] That there is no shift in the burden-of-proof, and in fact, a burden of proof question is in no way raised by the enforcement of the Dallas ordinance, are further indications that there is no genuine prior restraint consideration involved.

2. The Dallas ordinance does not single out businesses engaged in expressive activities for regulation and closure.

Although it is proper to reasonably classify businesses involved in even expressive activity, the Dallas ordinance does not, as the adult cabaret petitioners argue, single out for regulation those businesses engaged in expressive activities. The ordinance regulates all sexually oriented businesses, including businesses that offer no expressive activities at all, such as escort agencies, sexual encounter centers, nude modeling studios, and certain

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[4] See George Anastaplo, *The Constitutionalist: Notes on the First Amendment* (Dallas: Southern Methodist University Press, 1971), p. 680 n. 18.

adult motels.[5] Neither do the disqualifications single out those engaged in expressive activities. Only three out of the thirteen disqualifying crimes involve any use of expressive materials and then only materials that are constitutionally unprotected.

Petitioners cite *Arcara v. Cloud Books, Inc.*, 478 U.S. 647 (1986), as support for their "singling out" theory. But there, this Court upheld the closing of a bookstore by the enforcement of a public health regulation of general application. The Court applied no First Amendment scrutiny in *Arcara* because the sexual activity for which the bookstore was closed manifested "absolutely no element of *protected* expression." *Id.* at 705 (emphasis added). Likewise, under the Dallas ordinance, a license denial or revocation predicated on convictions for specified crimes involves absolutely no element of protected expression. Only three of the crimes are at all related to expressive activities (obscenity; the sale, distribution, or display of material harmful to a minor; and possession of child pornography), and the requirement of conviction for these crimes removes any question about the presence of an element of protected expression. By their nature as crimes, these offenses represent activity associated only with unprotected expression. It is clear that the Dallas ordinance does not single out persons or businesses

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[5] The Court majority in *Renton* was not disturbed by the fact that the ordinance then under review singled out only adult motion picture theaters for regulation. This fact was noted by the dissent. *Renton*, 475 U.S. at 57 (Brennan, J. dissenting).

engaged in First Amendment protected activities either for general regulation or for license denial or revocation.

3. A city may properly rely on convictions for sexually related crimes that include an element of unprotected expressive activity, to temporarily disqualify a person from holding a sexually oriented business license.

It is not unusual for regulatory authorities to include various kinds of criminal conduct as a disqualification for persons to hold licenses in regulated businesses. In fact, the City of Dallas makes such provisions in many of its ordinances. See § 6A-7(2) in Amusement Center ordinance, J.A. 54; and § 14-11(b)(6) in Dance Hall ordinance, J.A. 68, for two examples.[6] These eligibility requirements are generally for the safety of the patrons as well as the surrounding communities.

The bookselling and video petitioners mischaracterize the purpose of the license disqualification provisions of the ordinance as being the prevention of future speech crimes. This conclusion is based on the fact that three of the thirteen crimes that serve as disqualifications are crimes that involve expression, that is, obscenity; the sale, distribution, or display of harmful material to a minor; and possession of child pornography. The purpose of the ordinance, however, is to minimize sexually related crimes that have been documented to proliferate in areas

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[6] The sections of these ordinances cited here are correct. Other portions of these ordinances as printed in the Joint Appendix do not include all current amendments.

surrounding sexually oriented businesses.[7] The city has selected as one method of accomplishing this purpose, the disqualification of offenders who, because of their sex-related crimes, should not be trusted with the operation of sexually oriented businesses because those businesses are highly susceptible to criminal abuse. It would be contrary to the stated purpose of the ordinance and certainly illogical for the city to issue a sexually oriented business license to a person who had recently been convicted of crimes the ordinance seeks to control. A conviction for promotion of prostitution would clearly justify the denial or revocation of a sexually oriented business license. cf. *Arcara*, 478 U.S. 697 (1986). It is erroneous to argue that the First Amendment provides a shield to a person whose sexually related crime happens to be obscenity.

The Court has recognized this general principle in approving the use of obscenity convictions as a predicate offense for prosecution under the Indiana RICO statute in *Fort Wayne Books v. Indiana*, 489 U.S. ___, 109 S.Ct. 916, 103

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[7] The City of Dallas considered studies conducted by the following cities, counties and organizations: Austin, Texas (DX 6); Indianapolis, Indiana (DX 7); Houston, Texas (DX 8); Beaumont, Texas (DX 9); Amarillo, Texas (DX 10); City of Los Angeles, California (DX 11); Phoenix, Arizona (DX 12); Las Vegas, Nevada (DX 13); Seattle, Washington (DX 14); Los Angeles County, California (summarized in DX 6); St. Paul, Minnesota (summarized in DX 6); and Vantex Enterprises, Inc., d/b/a Sheraton Mockingbird West (DX 21 and 22). The City of Dallas also conducted its own study (DX 19 and 20). These studies were consistent in their findings that higher crime rates and lower property values were directly related to sexually oriented businesses.

L.Ed.2d 34 (1989). Since conviction under a RICO statute can result in the forfeiture of all assets used and acquired in the course of "racketeering" activity, this holding could have more dire consequences for the suppression of expressive materials than the temporary disqualification imposed by the Dallas ordinance. If there is "no constitutional bar to the State's inclusion of substantive obscenity violations among the predicate offenses under its RICO statute" (*Id.* 103 L.Ed.2d at 50), there can be no constitutional bar to the inclusion of a substantive obscenity conviction among the predicate crimes that serve as a temporary disqualification from holding a license to operate a sexually oriented business.

Petitioners point to the concurring opinion in *Arcara* as support for their argument that obscenity is an improper predicate offense for license denial or revocation. The concurring opinion warns that if "a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns." The Dallas ordinance, however, is not a pretext for closing down sexually oriented businesses. Quite the contrary, the ordinance acknowledges the legal status of such businesses by providing them a license to operate. Even so, the city is not arguing that the ordinance does not raise First Amendment concerns, only that these concerns are addressed under the proper standard of review.[8] (See the discussion in Part II of this Brief.)

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[8] The Court in *Arcara* made one point that deserves attention. Respondents in *Arcara* argued that the effect of the statu-

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tory closure impermissibly burdened its First Amendment-protected book selling activities. The Court observed that "the severity of this burden is dubious at best, and is mitigated by the fact that respondents remain free to sell the same materials at another location." *Id.* at 705. Although the Dallas license denial and revocation provisions would temporarily disqualify a person from operating a sexually oriented business at any location within the city, this burden is not sufficient to warrant strict scrutiny because the regulation only indirectly affects speech, and the only speech that is indirectly affected is considered to be of a lesser value. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 and 70 (1976); *Renton*, 475 U.S. at 49 n. 2.

The Brief of amicus curiae, PHE, Inc., in support of petitioners, asserts that such literary works as *Ulysses* and *The Canterbury Tales* will be affected by the Dallas ordinance. PHE Br. 12. This assertion is erroneous since § 41A-21(e) of the ordinance (See J.A. 37) provides an exception under both the licensing and location requirements for material that contains serious literary, artistic, political, or scientific value. It is clear that what sexually oriented businesses serve is not a creative literary and political culture, as described in the amici curiae brief of American Booksellers Association (Booksellers Br. 4), but rather the right of entrepreneurs to profit from the base gratification of others. The customers of sexually oriented businesses are hardly interested in Joyce or Chaucer. They are seeking sexual satisfaction (see, for example, DX 33). As aptly stated in the dissenting and concurring opinion of Justice Stevens in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. ___, 103 L.Ed. at 65 (1989), "Many sexually explicit materials are little more than noxious appendages to a sprawling media industry." While the right to sell this material is a constitutionally protected right, sexually explicit material has been recognized as a form of expression in which there is "a less vital interest in uninhibited exhibition . . . than in the free dissemination of ideas of social and political significance . . . ." *American Mini Theatres*, 427 U.S. at 61; *Renton*, 475 U.S. at 49 n. 2.

4. The Dallas ordinance causes no ascertainable restriction on the public's access to constitutionally protected sexually oriented materials.

This Court has declined to hear petitioners' challenges to the location restrictions of the Dallas ordinance. Location restrictions would appear to have greater impact on the operation of sexually oriented businesses than licensing regulations, since many nonconforming businesses will have to move or change their operations at the end of the three-year amortization period. See § 41A-13(f), J.A. 27. Although a particular purveyor disqualified by a criminal conviction may be temporarily unable to sell sexually explicit materials or services at a sexually oriented business, the competition for locations will, without doubt, result in a new purveyor taking his place, as well as acquiring his stock-in-trade, and public access to sexually oriented materials and services will not be diminished.[9]

As discussed in the concurring opinion in *American Mini Theatres*, "the central First Amendment concern remains the need to maintain free access of the

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[9] In fact, Petitioner FW/PBS, Inc. argued in its brief to the Court of Appeals that between 106 and 114 currently operating sexually oriented businesses (not to mention new sexually oriented businesses entering the market) would be competing for no more than 50 locations under the Dallas ordinance. If Petitioner is to be believed, the competition for locations should be fierce. (See Opening Brief of Appellant FW/PBS, INC., et al., filed at the United States Court of Appeals for the Fifth Circuit No. 86-1723 pp. 43, 45-46, 51).

public to the expression." *American Mini Theatres*, 427 U.S. at 77. Because the owners of sexually oriented businesses convey primarily the messages of others [See Id. at 78 n. 2 (Powell, J. concurring)], it is of little consequence to the availability of the materials or services, which purveyor operates the commercial enterprise that sells them. It is important, however, to the suppression of crime. This regulation will have the effect not of suppressing protected expressive materials, but of assuring that the merchants who purvey such materials are persons who do not by their own acts contribute further to the deleterious secondary effects of sexually oriented businesses.

B. The procedural safeguards required in *Freedman v. Maryland*, 380 U.S. 51 (1965) are not applicable to the Dallas sexually oriented business ordinance.

The procedural safeguards prescribed in *Freedman v. Maryland*, 380 U.S. 51 (1965) were designed to deal with a licensing and censorship system which called for routine submission of all motion pictures to a censor before the films could be shown publicly. Upon a decision by the censorship board, a film could be found to be unprotected and thereby barred from exhibition until the exhibitor undertook a time-consuming appeal to the Maryland courts. *Id.* at 54. In *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), this Court found the *Freedman* safeguards applicable to an attempt to use the Texas public nuisance statute to enjoin the future exhibition of unnamed films that depicted particular acts enumerated in the state's obscenity statute. Similarly, in *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977), this

Court invalidated a state court order enjoining petitioners from marching with swastikas and distributing materials which promote hatred against the Jewish faith, because the process used in imposing the injunction lacked the procedural safeguards of *Freedman*.

In each of these cases the government was seeking to suppress the content of undesired expression. The Court found that if "a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, . . . " *National Socialist Party*, 432 U.S. at 44. The policy behind requiring such strict safeguards is that it "is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. . . ." *Vance*, 445 U.S. at 316. The *Freedman* test is designed to place the burden in these circumstances on government to expedite the determination of whether expressive material, which the government wishes to suppress, is constitutionally protected. The license denial and revocation provisions of the Dallas ordinance contain none of the elements of censorship found in these cases.

1. The Dallas ordinance contains no censorship of expressive materials.

The obvious as well as announced purpose of the Dallas ordinance is to control the secondary effects of sexually oriented businesses on surrounding neighborhoods. These effects have been demonstrated to include the proliferation of crime, urban blight, and plummeting

property values. The license denial and revocation provisions of the ordinance contain no censorship features. Nothing in the licensing scheme regulates the content of any expressive materials purveyed on the premise of a sexually oriented business.

There are no subjective judgments to be made here by governmental officials administering the denial and revocation procedure. The chief of police is required to issue a license unless he finds one or more of ten objective statements to be true. See § 41A-5, J.A. 17-20. Objective criteria are provided throughout the ordinance as the basis for action by any city official that would adversely affect the holding of a license. None of the possible adverse actions is based on the content, or any determination concerning the content, of the expressive materials purveyed on the premises of a sexually oriented business.

For these reasons the Court of Appeals correctly found that "the Ordinance need only meet the standards applicable to time, place, and manner restrictions and need not comply with *Freedman's* more stringent limits on regulations aimed at content." *FW/PBS, Inc. v. City of Dallas*, 837 F.2d at 1303. The Court of Appeals determined that the license denial and revocation provisions would, in fact, withstand strict scrutiny since the city established a "compelling justification for barring those prone to . . . [sexually related] crimes from the management of . . . [sexually oriented] businesses." *Id.* at 1305. It did not see fit to discuss the *Freedman* procedural safeguards because those safeguards do not apply to a regulation that does not at all attempt to restrict the contents of any expressive material, named or unnamed.

2. The licensing requirements of the Dallas ordinance are a valid means of ensuring enforcement of the location restrictions and are in furtherance of the city's purpose of reducing the deleterious effects of sexually oriented businesses on surrounding neighborhoods.

In *American Mini Theatres*, this Court upheld an ordinance containing licensing procedures which granted a broader discretion to administrative officials than does the Dallas ordinance.[10] In the present case, this Court declined to review the locational restrictions of the Dallas ordinance, thus leaving those regulations intact as affirmed by the Court of Appeals. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d at 1306. The licensing requirements of the ordinance are an integral and useful part of the enforcement of the locational restrictions.

A business must be in compliance with the locational restrictions to receive a license. By requiring each sexually oriented business to obtain a license, the city can pinpoint the location of each business for the purposes of measuring distances required by the restrictions. The city will have accurate records for determining compliance and for providing information to applicants about available locations. Further, without this regulatory system,

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[10] The Detroit ordinance gave the mayor power to refuse or revoke an adult theater license at any time upon proof of "the violation . . . , within the preceding two years, of any criminal statute . . . or [zoning] ordinance . . . which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby." *American Mini Theatres*, 427 U.S. at 91 (Blackmun, J. dissenting).

prospective sexually oriented businesses would be left to guess where other sexually oriented businesses are located. The licensing also benefits a business by assuring that its location is so documented that other businesses cannot move within 1000 feet and claim prior rights.

All of the regulatory components of the Dallas ordinance are aimed at controlling crime, protecting neighborhoods, maintaining property values, and preventing the spread of urban blight. The district court correctly pointed out, as the petitioners conceded, that licensing is a valid method of ensuring that regulated businesses abide by locational and other restrictions. *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1071 n. 26 (N.D. Tex. 1986).

3. The license denial and revocation provisions of the Dallas ordinance contain ample procedural safeguards for a noncensorship regulation that only incidentally affects speech.

While the procedural safeguards prescribed in *Freedman* are not applicable to the Dallas ordinance, the ordinance contains other procedural safeguards sufficient to protect the rights of applicants and license holders. It provides reasonable time periods within which the city must respond to applications and appeals. See § 41A-5, J.A. 17; and § 2-96(b), J.A. 39. The decisions of administrative officials must be based on objective criteria. An appeal to the permit and license appeal board from a suspension or revocation stays the action of the chief of police. See § 41A-11, J.A. 25. An appeal from the permit and license appeal board may be made to the state district court where a temporary restraining order may be

obtained to stay an order of the board pending a hearing on a temporary injunction or mandamus.

These procedures are more than adequate to protect the rights of persons engaged in an ongoing commercial enterprise, especially since the ordinance does not seek to regulate the content of any expressive material. Any effect that the ordinance's regulations may have on expressive material is incidental to the principal purpose of the ordinance to prevent the recognized secondary effects that sexually oriented businesses have on surrounding neighborhoods. For this reason the District Court was correct in its conclusion that *Freedman* is not applicable and that the "appeal, revocation, and suspension provisions are replete with procedural protections and reviewable standards . . . ." *Dumas v. City of Dallas*, 648 F.Supp. at 1075.

II. THE DALLAS ORDINANCE, WHICH AFFECTS EXPRESSION ONLY INCIDENTALLY AND ONLY IN FURTHERANCE OF SUBSTANTIAL GOVERNMENTAL INTERESTS WHOLLY UNRELATED TO THE REGULATION OF EXPRESSION, IS VALID UNDER *RENTON V. PLAYTIME THEATRES, INC.*, 475 U.S. 41 (1986) AND *UNITED STATES V. O'BRIEN*, 391 U.S. 367 (1968).

Not only are the license denial and revocation provisions of the Dallas ordinance content-neutral regulations that only indirectly affect expressive activities, but the activities which they affect are "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. . . ." *American Mini Theatres*, 427 U.S. at 70, and

Renton, 475 U.S. at 49 n. 2.[11] For these reasons, the Dallas ordinance merits the intermediate level of scrutiny offered by both *Renton* and *United States v. O'Brien*, 391 U.S 367 (1968). While the *Renton* test has often been applied to time, place, and manner regulations, the *O'Brien* test has been used in situations that did not necessarily fit the time, place, and manner description. As this Court recently reiterated, however, the test under *O'Brien* "is little, if any, different from the standard applied to time, place, or manner restrictions." *Texas v. Johnson*, ___ U.S. ___, 57 U.S.L.W. 4770, 4772 (U.S. June 21, 1989); *Ward v. Rock Against Racism*, ___ U.S. ___, 57 U.S.L.W. 4879, 4884 (U.S. June 22, 1989).[12]

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[11] To allow for appropriate distinctions between near obscenity and other forms of speech will not diminish the vitality of the First Amendment. In his article "How to Read the Constitution of the United States," *Loyola University of Chicago Law Journal*, Fall 1985, George Anastaplo observes:

> After recognizing that political speech is at the heart of the "freedom of speech" clause, it is salutary to remind ourselves that our extensive freedom of political discussion did develop independent of the licentiousness to which we have recently become accustomed. Thus, neither principle nor history dictates that we must put up with licentiousness in order to have political freedom and effective self-government. Ibid., 54.

See also, G. Anastaplo, *The Constitution of 1787: A Commentary* (Johns Hopkins University Press, 1989) at 321 n. 98.

[12] This Court also explained in *Ward v. Rock Against Racism* that the "least restrictive" analysis sometimes attributed to *O'Brien* no longer applies to content-neutral regulations that only indirectly affect expressive activities.

The Court of Appeals in this case noted that the "*Renton* standard of review applies to the details of the licensing scheme . . . even though the licensing scheme may regulate aspects of the businesses' operations other than location." *FW/PBS v. City of Dallas*, 837 F.2d at 1304. It thus found the licensing requirements were designed "to control the negative effects of a certain kind of business rather than to suppress a certain type of speech" (*Id.* at 1302) and are, therefore, as valid as the location restrictions that these requirements serve. For this reason, the Court of Appeals held that the " 'time, place or manner' analysis cannot be limited solely to regulation of 'place.' " *Id.* at 1304.

Under *Renton*, "content-neutral" time, place, and manner regulations are constitutional if they are "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 47. The only part of the licensing scheme the Court of Appeals in *FW/PBS* did not immediately recognize as a time, place and manner regulation were the provisions relating to license disqualifications for criminal convictions. The court reasoned, however, that

> The courts have not engaged in . . . strict scrutiny and have not otherwise required compelling necessity to justify other occupational bars attending a criminal conviction including those laced with activity protected by the first amendment such as labor organizing. In short, the city need only show that conviction and the evil to be regulated bear a substantial relationship.
>
> We agree with the district court that the Ordinance now is well tailored sufficiently to achieve its ends. *FW/PBS, Inc. v. City of Dallas*. 837 F.2d at 1305.

Because of the direct and substantial relationship between the offense and the evil to be regulated and because of the fact that the denial or revocation is temporary, the Court of Appeals determined that the disqualification provisions should not be analyzed under a standard different from that applicable to the ordinance as a whole.

Content neutrality

It is settled that an ordinance may be considered a "content-neutral" regulation for purposes of analysis under *Renton*, even though it classifies businesses based on content, if its measures are aimed not at the content but rather at the secondary effects of the business on the surrounding community. *Renton*, 475 U.S. at 47-48. A regulation is content-neutral if it is justified without reference to the content of the regulated speech, *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). The license denial and revocation provisions of the Dallas ordinance are content-neutral because they are aimed at the secondary effects of sexually oriented businesses and not at the content of what is sold on the premises of the businesses, and the provisions are justified without reference to the content of the materials. Even the dissenting opinion in the Court of Appeals recognized that the Dallas ordinance is content-neutral. *FW/PBS v. City of Dallas*, 837 F.2d at 1308 (Thornberry, J. concurring in part and dissenting in part).

Governmental interests served

The Dallas ordinance is designed to serve the same vital governmental interests that were at stake in both

Renton and *American Mini Theatres*. A city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. *American Mini Theatres*, 427 U.S. at 71; *Renton*, 475 U.S. at 50.

Alternative avenues of communicatio:

The Dallas ordinance as a whole has been held to provide reasonable alternative avenues of communication for sexually oriented businesses. *Dumas v. City of Dallas*, 648 F.Supp. at 1069-71; *FW/PBS v. City of Dallas*, 837 F.2d at 1303. Individuals who are temporarily denied licenses also have limitless alternative avenues of communication. They may write, create, publish, sell wholesale, sell through the mail, or give away sexually explicit material. They may even operate a bookstore so long as it does not have as one of its principal business purposes, the sale of sexually explicit materials. The only limitation on individuals convicted of certain crimes is that temporarily they cannot operate a specific type of commercial establishment.

This Court should thus uphold the Dallas ordinance as a "content-neutral" time, place, and manner regulation designed to serve a substantial governmental interest which does not unreasonably limit alternative avenues of communication. If the Court determines, however, that the license denial and revocation provisions should be separated for analysis, the fact that they do not fit neatly into the time, place, and manner category should not deter the court from analyzing them under the same standard of review. In all respects, they meet the same criteria as the other provisions of the ordinance. This becomes very clear when the *O'Brien* test is applied.

The O'Brien test

Under *O'Brien*, a regulation is justified despite its apparent impact on First Amendment interests (1) "if it is within the constitutional power of the government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, at 377.

First, the City of Dallas, unquestionably, has the constitutional authority to enact licensing ordinances of this type. *American Mini Theatres*, 427 U.S. 50; see also, *Cox v. New Hampshire*, 312 U.S. 569 (1941). Second, as already noted, the license denial and revocation provisions of the Dallas ordinance clearly further important and substantial governmental interests of crime control. Third, the legislative history of the ordinance demonstrates that the governmental interest promoted by the ordinance is unrelated to the suppression of free expression. *Dumas v. City of Dallas*, 648 F.Supp. at 1069; see also, *Id.* at 1064-65 nn. 8-10, 1069 n. 21.

Finally, any incidental restriction that the ordinance may place on an individual's First Amendment freedom is no greater than is essential for the furtherance of the city's important and substantial governmental interest. *Dumas v. City of Dallas*, 648 F.Supp. at 1069. This fourth prong of *O'Brien* must be approached with awareness of the admonitions of *Renton* and *United States v. Albertini*, 472 U.S. 675 (1985). This Court in *Renton* observed that cities "must be allowed a reasonable opportunity to

experiment with solutions to admittedly serious problems" and was careful not to second-guess the wisdom of the particular method chosen. *Renton*, 475 U.S. at 52. In *Albertini*, the Court insisted that time, place, or manner regulations are not invalid simply because there is some imaginable alternative that might be less burdensome on speech. *Albertini*, 472 U.S. at 689. While one might devise an alternative that is less restrictive than the license denial and revocation provisions of the Dallas ordinance, this court made its position on this subject very clear in *Ward v. Rock Against Racism*, ___U.S.___, 47 U.S.L.W. 4879 (U.S. June 20, 1989):

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-intrusive means of doing so. *Id.* at 4884.

The license disqualification provisions are narrowly tailored to apply only to businesses which have been documented as routinely causing adverse secondary effects and only to the crimes which are most prevalent in and around these types of businesses.[13] As the District Court pointed out:

> This principle was squarely addressed in *Arcara v. Cloud Books, Inc.*, ___U.S___, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986)(Burger, C.J.), in which the Court held that a sexually related business could be closed when management was aware of sexual behavior on

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[13] The District Court ruled that five enumerated crimes were not sufficiently related to the purpose of the ordinance. *Dumas v. City of Dallas*, 648 F.Supp. at 1074. The City Council subsequently amended the ordinance to remove those crimes.

> the premises, in violation of law. If violation of law by a licensee may permissibly justify closure, it follows inescapably that one who has been convicted of a sex-related crime may be denied licensure. . . . One intent of the law was to prevent crime; the Ordinance considers only certain crimes to be relevant – such as prostitution, obscenity, or child pornography . . . . It allows even those convicted of such offenses to be licensed after a certain amount of time has elapsed. . . . It is thus narrowly tailored to avoid licensure of those who have recently shown a predilection toward the criminal conduct the Ordinance was designed to overcome. *Dumas v. City of Dallas*, at n. 34.

The licensing provisions of the Dallas ordinance satisfy the fourth element of the *O'Brien* test as elaborated by *Albertini*, in that they promote a substantial governmental interest that would be achieved less effectively in the absence of the regulation.

The *O'Brien* test was formulated and applied in a case upholding a regulation which indirectly affected highly protected political speech. Thus, the test's application to a regulation that indirectly affects expression of a much lesser value should require little debate. It is apparent that the license denial and revocation provisions of the Dallas ordinance are valid under the *O'Brien* test.

III. THE DALLAS ORDINANCE'S ADULT MOTEL REGULATIONS DO NOT VIOLATE THE FIRST, FOURTH, FIFTH, OR FOURTEENTH AMENDMENTS OR ANY CONSTITUTIONALLY PROTECTED FREEDOMS OF ASSOCIATION.

This Court accepted review of the adult motel regulations in the Dallas ordinance to determine whether those

regulations violate the First, Fourth, Fifth, or Fourteenth Amendments to the Constitution or any constitutionally protected freedom of association. Since the motel petitioners failed to argue a single Fifth or Fourteenth Amendment violation in their brief, those two issues must be settled in favor of the city. By petitioners' own admission, they have not challenged the Dallas ordinance on Fifth Amendment grounds. See Brief of Petitioners Calvin Berry, III, et al. at 4 (hereinafter Berry's Br.). The only issues which remain are the challenges under the First and Fourth Amendments and the challenge regarding associational freedoms.

The motel petitioners have asserted two issues not raised before. These include rights of commercial free speech (*Id.* at 14-15) and "the right to be let alone" (*Id.* at 13-14), neither of which have been previously argued in this case. Ordinarily, this Court does not decide questions not raised or resolved in the lower court except in exceptional circumstances. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *citing California v. Taylor*, 353 U.S. 553, 557 n. 2 (1957); *Lawn v. United States*, 355 U.S. 339, 362-63 n. 16 (1958). There has been no attempt to show exceptional circumstances in this case; therefore, the Court should limit its review to issues that were considered below.[14]

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[14] In any case, petitioners do not explain the commercial free speech issue sufficiently to permit rebuttal. Their assertions regarding the "right to be let alone" seem to be similar to their privacy assertions. Indeed, their argument seems to be that they have a "right" not to be regulated in any way by the city.

The motel petitioners attack the Dallas City Council's findings as not specific enough (Berry's Br. 9-10); not supported by evidence (*Id.* at 12); and not " 'findings' at all, but purely speculative conclusions." *Id.* at 12. These attacks have no merit. The Court need only consider the studies and evidence contained in the record, (DX 1-2, 5-15, 17-18, 20 and 22); the unanimous findings of the City Plan Commission and the City Council (DX 16); the findings of the trial court (*Dumas v. City of Dallas*, 648 F.Supp. at 1076); and the conclusions of the Court of Appeals (*FW/PBS v. City of Dallas*, 837 F.2d at 1304-05), to realize that these attacks on the legislative findings have no basis.

Petitioners' First Amendment challenge is based on their assertion that the motel rooms they rent to the public have public access television transmissions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas." Berry's Br. 13. The ordinance definition creates three categories of activities that will bring a motel under the regulations for adult motels: (A) the offering and advertising, by way of a sign visible from the public right-of-way, of sexually explicit photographic reproductions available through television; (B) the offering of a sleeping room for rent for a period of time less than 10 hours; *or* (C) allowing the occupant of a sleeping room to subrent the room for a period of time less than 10 hours. See § 41A-2(4), J.A. 10.

By their own admission (Berry's Br. 4), petitioners' motels do *not* have a sign visible from the public right-of-way which advertises the availability of photographic

reproductions; therefore, they are not subject to the ordinance under Paragraph (A) of the definition and consequently are not being regulated on the basis of any First Amendment activity. In fact, there is nothing in the record of this case (other than the assertion in petitioners' brief) to verify that the motel rooms belonging to petitioners are equipped with television sets at all. The regulation of petitioners' adult motels is based solely upon the time period for which they rent rooms. Indeed, the Court of Appeals found, it "is certainly within reason that short rental periods facilitate prostitution . . . " (*FW/PBS v. City of Dallas*, 837 F.2d at 1304), and this type of criminal activity is what the ordinance seeks to suppress.

Having admitted that they are not regulated on the basis of any expressive activity, the petitioners' argument concerning lack of studies is irrelevant since extensive studies are not necessary to justify a business regulation that does not implicate the First Amendment. If, however, petitioners' motels had advertised in a way to subject themselves to the ordinance based on paragraph (A) of the definition, the city's substantial governmental interest in regulating adult motion picture theatres and adult arcades would have justified regulation of petitioners' adult motels. Both the theater and arcade uses have the same characteristics as motels that advertise sexually explicit videos or movies [See definitions in § 41A-2(1) and (5), J.A. 9-11]. The studies regarding those uses and adult motel uses (DX 6-14 and 19-22) substantiate the need for regulation.

One of Petitioners' Fourth Amendment challenges is based on their characterization of a motel room as a "temporary home." Berry's Br. 15. The assertion that a

stay in a motel room of less than 10 hours establishes a "temporary home" is without merit. Renting a motel room for two hours is more clearly associated with prostitution (*FW/PBS v. City of Dallas*, 837 F.2d at 1304), than with "the creation and sustenance of a family." *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984). This viewpoint is substantiated by the revealing statement in the motel petitioners' own brief that the "well-recognized 'quickie', the 'nooner', the 'one night stand' are traditional in America. . . ." Berry's Br. 19.

Petitioners mention the right to privacy many times in their brief. They do not explain, however, exactly how they believe anyone's right to privacy is being violated. To some extent their argument seems to be based upon their view of a motel room as a temporary home, but they also refer to the right to privacy of motel owners. Berry's Br. 14. In any case, no right to privacy issues are implicated in the Dallas ordinance.

Petitioners also attempt to find a Fourth Amendment issue by a cursory mention of the inspection section of the ordinance. Berry's Br. 19. The purpose, intent, and application of that section is to insure compliance with fire, safety, and other regulations, none of which apply to the activities of patrons who are renting rooms. The provision authorizes inspections when a business is occupied or open for business and was intended to limit the times at which businesses could be inspected. Furthermore, § 41A-7(c) specifically provides that the inspection provisions do not apply to rented motel rooms. In any case, under "the administrative search doctrine, searches to enforce regulatory standards may be reasonable in light of the reduced expectation of privacy in a pervasively

regulated business." *FW/PBS v. City of Dallas*, 837 F.2d at 1306, *citing United States v. Biswell*, 406 U.S. 311 (1972) and *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). The Court of Appeals held that "sexually oriented businesses face a degree of regulation that renders the inspection provision presumptively reasonable." *FW/PBS v. City of Dallas*, 837 F.2d at 1306.

Finally, the Dallas ordinance does not violate motel owners' and operators' rights of intimate or expressive association. Motel owners and operators do not share with patrons a special community of thoughts, experiences, beliefs, nor the distinctively personal aspects of their lives. Motel patrons are numerous and motel owners are not highly selective in their decisions to rent rooms to them. See *Roberts*, 468 U.S. at 620. Renting rooms to the public is not an activity protected as an intimate association.

In a further attempt to establish an issue of expressive association, the motel petitioners again rely on their assertion that the motel rooms contain television sets. Putting a television in a motel room does not make the renting of that room an expressive act protected by the Constitution. Petitioners also assert that the associational activities of their patrons are protected by the First Amendment. That may be so, but nothing in the Dallas ordinance regulates the activities of the patrons of motels. It does not affect how long they may stay nor what they may do while they are there. No issue of expressive or intimate association is raised by this case.

The arguments of the motel petitioners do not substantiate any of their asserted constitutional claims. For

this reason, the Court must uphold the adult motel provisions of the ordinance as valid regulations to protect the public health, safety, morals, and general welfare. The regulations are clearly not arbitrary nor unreasonable, but are rationally related to the city's legitimate interest in curbing prostitution and other sex-related crimes. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Shelton v. City of College Station*, 780 F.2d 475, 479 (5th Cir. 1986)(en banc), *cert. denied*, 477 U.S. 905 (1986) and 479 U.S. 822 (1986).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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